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Federal Communications Commission  
Office of Secretary

Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
 )  
Revision of Procedures Governing ) MB Docket No. 05-210  
Amendments To FM Table of ) RM-10960  
Allotments and Changes Of )  
Community of License in the )  
Radio Broadcast Services )

To: The Commission

DOCKET FILE COPY ORIGINAL

COMMENTS OF CHARLES CRAWFORD

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October 3, 2005

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## SUMMARY

1. The filing of multiple allotment petitions for small communities in rural areas provides frequencies to accommodate regional clusters as an adaption of the practices of owners of multiple stations in the cities. It also is an effort to counteract the preference for allotments in cities under the Commission's population-based allotment criteria. The number of multiple allotment petitions for rural communities filed by Mr. Crawford is a drop in the ocean compared with petitions for cities that have predominated the Commission's dockets ever since the FM table of assignments was established more than fifty years ago. None of Mr. Crawford's petitions were listed in FM Broadcast Auction No. 37 referred to in the Commission's notice.

2. We have provided a study of allotment decisions under the "Tuck" policy established in the case of Faye and Richard Tuck in 1988 which shows that the migration of FM allotments to the cities under that policy has been uniformly granted by the Commission virtually "for the asking." This regulatory policy simply doesn't work and should be remedied or abandoned.

3. We offer comments on other aspects of the notice of proposed rulemaking, the most important of which is to urge the Commission to continue to carry out its FM allotment regulatory program within the rulemaking structure of the Administrative Procedure Act. The FM allotment structure, along with the TV allotment structure, has brought to our nation an unparalleled grid of commercial and noncommercial radio and television broadcast

stations, a success story for this federal administrative agency.

4. While in our view the FCC needs to make some adjustments, e.g., fixing the unfortunate "Tuck" policy and strengthening the emphasis on rural areas lying outside urbanized areas, it would be unwise, if not unlawful, to abort the present structure under the Administrative Procedure Act in favor of an ill-defined one-step "closed" allocation system in reliance on the Commission's database and precluding meaningful public notice and participation in the process.

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To: The Commission

COMMENTS OF CHARLES CRAWFORD

I.  
Public interests served by filing multiple  
petitions for rulemaking to allot channels to  
small towns in rural areas

1. Charles Crawford is a veteran FM radio sales executive headquartered in Dallas, Texas. Over the past several years, he has filed a substantial number of petitions for frequencies serving small communities that are sufficiently removed from major metropolitan areas so there is no prospect that the allotment is merely a step to inaugurate still another facility serving a major broadcast market. Such petitions seek allotments to relatively small communities in their own right and have merit under established Section 307(b) principles.

2. The filing of multiple petitions in this fashion has its genesis in the development in radio broadcasting of Localized Network Programming. This is a concept that has been developed by the major broadcasters for essentially mid to major markets. It is an approach that provides the economy of a network but the feel and appearance of local programming. The belief of Mr. Mr. Crawford is that such a plan will work with small communities



on a regional basis.

3. In geographic areas such as Eastern Oklahoma, Western Oklahoma, North East Texas, West Texas, South Texas, rural Louisiana, etc., the licensees of FM stations in small communities of a given region can initiate unique network programming designed specifically for that region and additionally provide localized community inserts, such as local weather, local events, programming from specific remote locations, regional-specific news, public affairs, public service announcements, promotions and other programming giving life to the Commission's policy favoring localism in broadcasting. While there would be local sales, the focus would also be in regional network sales, drawing on the advantages of advertising to the region and the unique nature of the region.

4. The vision is that providing radio service to an area of, say, 5,000 people may not allow for the operation of a traditionally-run radio station. However, a network of ten stations in an identifiable geographic area covering, say, 50,000 people could very well be economically viable. This concept is an approach to providing radio service to clusters of stations in small communities as an adaptation of the nature of modern radio developed by the major group owners for radio markets in the cities.

5. Such a populist concept -- as a counterpoint to allotting frequencies to communities in or adjacent to major radio markets based upon mesmerizing population counts which invariably

prove that more people live in cities than in small towns -- offers an innovative, modern public interest factor under Section 307(b).

6. It takes a substantial number of allotments in small communities in rural areas to facilitate this vision. However, the aggregate number of such petitions is a small fraction of the aggregate number of rulemaking petitions over the past fifty years or more that have led to the vast number of broadcast stations in the nation's cities.<sup>1</sup> Unfettered application of historical population-based allotment criteria -- if unopposed by such strategies -- will continue to siphon the FM spectrum into the cities leaving precious little for rural America.

7. The Commission itself has recently shown signs of concern for rural areas. For some examples, see News Release, dated August 6, 2003, entitled FCC Commences Land of Opportunity Initiative for Rural America, Access to Affordable and Quality Telecommunications Services in Rural America; News Release, dated July 2, 2003, entitled FCC and United States Department of Agriculture Hold Kick-off Meeting of the "Federal Rural Wireless Outreach Initiative"; News Release, dated May 8, 2003, entitled FCC Acts to Enhance Rural Participation in Spectrum Auctions.

8. Some years ago, the Commission's Memorandum Opinion and Order regarding Modification of FM and TV Authorizations to Specify a New Community of License, 5 FCC Rcd 7094, 7096, 7099

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<sup>1</sup> None of Mr. Crawford's petitions were listed in FM Broadcast Auction No. 37 to which the Commission's notice refers at ¶32.

(1990), stated with regard to "other public interest matters" to be considered under Section 307(b), "...it is proper for the Commission to consider whether a proposal would result in shifting of service from an underserved rural to a well-served urban area and the public interest consequences of any such change." citing Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88, 92 (1988). While this policy historically has been applied to removal of an existing service to rural areas, the intent of the policy would be served by rejecting still greater emphasis on numbers-based allotments reflected in the captioned rulemaking notice that will continue to deny meritorious new rural service in order to add still more service to exceedingly well served urban areas.

9. In Albemarle and Indian Trail, North Carolina, Memorandum Opinion and Order, released May 20, 2004 in MM Docket No. 99-240, the Statement of then Commissioner Kevin J. Martin, now Chairman Martin, has direct application to allotment issues to be addressed in this rulemaking proceeding: "Local radio stations play an important role in their communities, providing local news, information and entertainment to residents, and generally serving as good corporate citizens in local community life. This is particularly true in smaller towns, where the radio stations are limited in number. Yet there are still rural areas of our country that do not have even one local radio station. As a native of this part of North Carolina, I am therefore particularly pleased to approve the first local broadcast radio service in

Indian Trail. I hope this new station serves the community well."

10. If a personal note may be permitted, the undersigned counsel for Mr. Crawford, with roots in small town life in rural Kansas, has first hand knowledge of the values of a local radio station for such a community.

## II.

### Migration of spectrum to urbanized areas under the "Tuck" policy for nearly two decades since 1988

11. In the study of the Tuck policy, we are reminded of a protocol of the State Department. During the 1800's and early 1900's when our nation was actively acquiring interests in islands and territories in competition with nations such as England and Spain, statutes and other documents would at times provide that a given island or territory was "appertaining" to the United States. E.g., 48 U.S.C. §1411 regarding Navassa Island in the Caribbean near Cuba shortly prior to the Spanish American War. The State Department explains the meaning of "appertaining" in this way: "The use of the word 'appertain' is deft, since it carries no exact meaning and lends itself readily to circumstances and wishes of those using it." Sovereignty Study of State Department, 1931-1932, at 145-146 (copy attached as Exhibit 1 for handy reference).

12. So, too, here -- with respect to the Commission's Tuck policy. That policy is a menu of wildly subjective criteria:

- (a) The extent to which the community residents work in the larger metropolitan area;
- (b) whether the smaller community has

its own newspaper or other media that covers the community's local needs and interests; (c) whether community leaders and residents perceive the specified community as being an integral part of, or separate from the larger metropolitan area; (d) whether the specified community has its own local government and elected officials; (e) whether the smaller community has its own telephone book provided by the telephone company or zip code; (f) whether the community has its own commercial establishments, health facilities, and transportation systems; (g) the extent to which the specified community and the central city are part of the same advertising market; and (h) the extent to which the specified community relies on the larger metropolitan area for various municipal services such as police, fire protection, schools and libraries. Faye and Richard Tuck, 3 FCC Rcd 5374 (1988).

13. The kaleidoscope of combinations of facts and circumstances under these criteria is virtually endless. But there is more. All eight factors need not favor the applicant. If a majority of the factors favor the applicant and a minority are unfavorable, the specified community can be awarded the allotment. Id.; Parker and Port St. Joe, Florida, 11 FCC Rcd 1095, ¶¶9-11 (1996). So, there are kaleidoscopes of combinations of facts and circumstances both for and against the specified community.

14. But there is still more. Nowhere amongst this no-man's land of subjective facts and circumstances is there provision for

the most crucial consideration of all, i.e., a determination of the reasonable likelihood that a broadcast station with a signal serving the central city or metropolitan area will in truth serve as a meaningful local outlet for a designated licensed community.

15. We don't know if the Morningside situation (in which tiny Morningside, Maryland, 2000 U.S. Census population 1,925, is the home of the top-ranked station in the Baltimore-Washington market) was a product of the Tuck policy. But the Morningside case is symptomatic of the need to consider the reasonable likelihood of a meaningful local outlet for the smaller community in a major market in the Tuck line of cases. For many years now, the Morningside example involving Infinity's controversial and popular station has been a public fact of life in the Washington, D.C. area for the Commission and its staff to observe and alert them to this flaw underlying the Tuck allotment policy.

16. In a case that is currently before the Commission, Quanah, Texas (pending Application for Review of Bureau Memorandum Opinion and Order, released April 27, 2004 in MM Docket No. 00-148), the Bureau, while denying a counterproposal on other technical grounds, upheld Tuck determinations (a) that a full powered Class C allotment to serve the Dallas-Fort Worth radio market, ranked sixth in the nation, can be favored as a 307(b) first local outlet for a community imbedded in the market named Keller (population 13,683); (b) that a Class C-1 allotment to serve the Austin, Texas, market, the nation's 49th largest, can be favored as a 307(b) first local outlet for a community imbed-

ded in that market named Lakeway (population 4,044); (c) that a Class C-2 allotment to serve the Austin market can be favored as a 307(b) first local outlet for a community imbedded in that market named Lago Vista, Texas (population 2,199); and (d) that a Class C-1 allotment to serve the San Antonio radio market, the nation's 32nd largest, can be favored as a 307(b) first local outlet for a community imbedded in that market named Converse (population 8,887).

17. In another case that is pending before the Commission, Vinton, Louisiana (pending Application for Review of Bureau Report and Order, released November 26, 2004 in MM Docket No. 02-212), the Bureau upheld a Tuck determination that an established powerhouse Houston market radio station having a full Class C facility would be "reassigned" to serve as the first local outlet for a community imbedded in that market named Lumberton (population 8,731) and thus was favored in the 307(b) comparison with the first local outlet for a genuine stand alone community in rural Vinton, Louisiana (population 3,338). In arriving at this Tuck result, the entire sum and substance of the analysis in the staff's initial decision consisted of the following 21 words: "Tichenor has provided a showing that Lumberton is independent of Beaumont under the factors set forth in Faye and Richard Tuck". A more detailed statement in the staff's revisionist decision upon reconsideration cannot erase the fact that the Commission can apply the Tuck policy any way it wants to. Taking a page from the State Department's Sovereignty Study, the Tuck policy is

better suited to the art of diplomacy than to compliance with the rigors of reasoned decisionmaking under Motor Vehicle Manufacturers Association v. State Farm Insurance Company, 463 U.S. 29 (1983) and the Administrative Procedure Act.

### III.

The Commission should evaluate the efficacy of its "Tuck" policy as historically applied to new entrants in an urbanized area in light of the study of "Tuck" decisions submitted in the record of this proceeding and also in light of the inherent potential for a "Morningside" undermining of the allocation process

18. The United States Court of Appeals has held that it is incumbent on a federal agency to monitor the effectiveness of its rules and policies in relation to its regulatory duties and responsibilities. Bechtel v. FCC, 10 F.3d 875 (D.C.Cir. 1993). In that regard, we have previously filed with the Commission and are now submitting for the record in this proceeding a two-volume "Study of Reported Decisions by the FCC Applying the Tuck Precedent to Determine Whether to Grant or Deny a 'First Local Service Status' in FM Allotment Proceedings."

19. This study reflects that during the period from September 1995 to August 2004, at least 54 reported decisions applied the Tuck policy. An effort was made to find all such reported decisions although we cannot say that other reported decisions do not exist. We have excluded cases in which there is a reference to a Tuck submission, but the case was decided on other grounds.

20. One reported decision, in 1999, denied first local service status to the community of Lolo, Montana (population 2,747) located in the urbanized area of Missoula, Montana. In



all of the other 53 reported decisions studied, the Commission granted first local service status to the community for which such status was requested. The Tuck factors could be and in fact were applied to support the first local service status without fail, whether involving small proposed communities of license (such as Leupp, Arizona, population 857, and Gurley, Alabama, population 876), large proposed communities of license (such as Sunnyvale, California, population 131,760, and Hoover, Alabama, population 62,742), small urbanized areas (such as the Hyannis, Massachusetts, and Clarksville, Kentucky urbanized areas) or large urbanized areas (such as the Chicago, Dallas-Fort Worth and Atlanta urbanized areas).

21. Since 1995, a favorable Tuck result has been available to the party seeking first local service status virtually for the asking. Moreover, the single case in which a first local service status was denied in 1999 is indistinguishable from other cases in which the status was always granted. Compare, e.g., Report and Order of Media Bureau, released November 30, 1999, MM Docket No. 97-203, denying 307(b) first local service status to Lolo, Montana, population 2,746 located 12 miles from the center city in the urbanized area, Missoula, Montana, population approximately 42,000, with Report and Order of Media Bureau, released February 9, 2004, MM Docket No. 02-79, granting 307(b) first local service status to Park City, Montana, population 870, 21 miles from the center city in the urbanized area, Billings, Montana, population 89,847.

22. We have given an example of decisions, like the Bureau Initial Decision regarding Lumberton, Texas in the Houston market providing no analysis whatsoever. A variation on this practice is to number the eight Tuck factors and then refer only to numbers leading to the decision without any substantive analysis, e.g., Report and Order of Media Bureau, released June 23, 2003, MM Docket 01-175 (Fletcher, North Carolina) at ¶3 and n. 6. Sometimes there is an extended analysis, e.g., Report and Order of Media Bureau, released November 29, 1996, MM Docket No. 95-175 (New Castle, Oklahoma) at ¶3. However, many if not most times, the analysis is a relatively concise statement, often in a footnote. But, whether there is no analysis, a brief analysis or a more extended analysis, the result is always the same. With the single exception noted, dating back over a period approaching two decades, the Tuck policy always favors a 307(b) first local service status for the subject community.

23. There is something wrong here. As indicated in ¶15, supra, the Morningside example is a warning sign to the Commission regarding the actual service orientation of stations in small communities having facilities reaching into the center city of an urbanized area. All Tuck cases involve this relationship since Tuck does not apply to situations located outside any urbanized area. This recurring truth about the attraction of the center city applies to major markets included in the survey such as Phoenix, Oklahoma City, Dallas-Fort Worth, Columbus, Ohio, Des Moines, Austin, Texas, Atlanta, Houston, Minneapolis-St. Paul,

Kansas City, Chicago, Charlotte, North Carolina, San Jose, California, Birmingham, Alabama, Jacksonville, Florida, Indianapolis, Orlando, Salt Lake City, Portland, Oregon, Seattle and Louisville. It applies to lesser markets such as Denton, Lubbock and Waco, Texas, Little Rock, Myrtle Beach, South Carolina, Spokane, Flagstaff, Binghamton, New York, Corpus Christi, Flint, Michigan, Panama City, Florida, Albany, New York, Kingsport, Tennessee, Tuscaloosa, Alabama, Goldsboro, North Carolina, Asheville, North Carolina, Athens, Georgia, Huntsville, Alabama, Columbia, South Carolina. It applies to small markets such as Hyannis, Massachusetts, Clarksville, Tennessee-Kentucky, Stuart, Florida, Longview, Texas, Billings, Montana, Prescott, Arizona and Cheyenne, Wyoming.

24. There are no metes and bounds to the policy. The door is wide open. With one exception, all Tuck cases are won by the proponent of a 307(b) first local service claim no matter what the facts or circumstances may be. In many of the cases, probably most of them, there is the inherent Morningside seed and temptation to seek the overall market audience rather than, in fact, serving as a genuine local outlet. In the meantime, FM spectrum is sucked into the urbanized area and is lost to stand alone small towns in rural areas.

25. Maybe the FCC has conducted its own study of the efficacy of the Tuck policy which is being applied so routinely because the study shows the policy is working so well. But we don't think so. We have never heard of such a study which surely

would have been mentioned in the case decisions. If no study has ever been made -- considering the many markets that are involved in the Tuck cases and taking into account the relative guarantee that submitting a Tuck showing will win the cause -- the chances are that the policy has spawned and is continuing to spawn Morningsides across the nation's countryside.

#### IV.

To apply the "Tuck" policy on a contrived premise that an established major market broadcaster may be accorded a decisional "first local outlet" status for a tiny community in its existing market is wildly devoid of rational thought

26. Virtually all of the 54 reported decisions that were studied involved an effort to establish a new station in -- or move an existing station into -- a community that is relatively small in relation to the urbanized area in which it is located. The proponents of the 307(b) first local station status are newcomers or existing stations seeking to establish a new or expanded broadcast service within the urbanized area.

27. None of the 54 reported decisions involves -- or stands as precedent for -- the use of Section 307(b) with regard to the Dallas-Fort Worth, San Antonio, Austin and Houston radio markets, in which established dominant radio broadcasters in the market whose economic interests will demand continued programming service that has led to such dominance, seek 307(b) credit for proposals to become the first local radio service for one of hundreds of small communities within their markets. Considering the total implausability of any such situated broadcaster or its station ever really doing this, these efforts take the amorphous

and undisciplined Tuck policy to a new, surreal level. The chances of this happening are about the same as the chances of Infinity jeopardizing its number one ranking in the Baltimore-Washington market with genuine local service for the Morningside community of license.

28. We are reminded of a line spoken by Jack Nicholson in the Academy Award winning movie, *Is This All There Is*, starring Helen Hunt as the female lead. Mr. Nicholson played the role of a successful author of novels about women who in his personal life, until ultimately brought to heel by Ms. Hunt, was given to sarcasm. A young female admirer upon meeting him and seeking an autograph asked, how can you be so perceptive about the way women think and feel? He responded, I envision how men think and feel, and then remove all semblance of reason. So too here. The efforts under the Tuck policy of long established powerhouse broadcasters in major markets to claim first local service credit under Section 307(b) for tiny communities within their metro service area take the already dubious Tuck policy and then remove all remaining semblance of reason.

V.

Other Comments

29. Other comments with regard to the notice of proposed rulemaking are these.

A.

Do not replace the APA rulemaking procedure with an ill-defined "adjudicatory" system to administer a table of allotments in the Commission's database

30. During oral argument of the recent case, Charles

Crawford v. FCC, before the DC circuit court, No. 04-1031, decided August 5, 2005, in a give-and-take colloquy with the panel, the undersigned counsel remarked that the grid of radio and television stations across the land is testimony to a federal agency regulatory success story on the part of the Commission.

31. With regard to AM radio, the system was built under the Ashbacker decision<sup>2</sup> through public notice of lists of applications and cut-off dates for filing competing applications. The grid of clear channel, regional and local AM stations established in the 1930's, 1940's and 1950's is still in place and working successfully.

32. The advent of television co-incided with adoption of the Administrative Procedure Act making provision for rulemaking proceedings to allow public participation in the process and, in concert with the Federal Register Act, to protect the citizens from undisclosed government regulatory activity adversely affecting their interests. Television allocations by use of the rulemaking process worked through early issues of VHF-UHF, color TV, reserving spectrum for educational television, the massive Sixth Report and Order and, throughout the decades, refinements through the rulemaking process which have continued to this day, e.g., the equally massive regulatory program for conversion to digital telecasting. Over a period of more than a half century, the allocations structure for the many thousands of FM stations in operation today was created under the APA rulemaking

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<sup>2</sup> Ashbacker v. U.S., 326 U.S. 327 (1945).

process with a similar record of success.

33. The system works. Both at the agency and in the courts, there is a fifty-plus year history of rulings and common law decisions regarding the administration and functioning of the rulemaking process as applied to FM and TV allocations. For example, in the area of "notice" to parties of the potential reach of "counterproposals" that may affect their interests, the recent decision in Charles Crawford v. FCC, decided in favor of the government, has added another useful precedent to the body of law on that subject dating back to Owensboro on the Air v. U.S., 262 F.2d 702 (D.C.Cir. 1958). The Administrative Procedure Act and its interpretative body of case law, and the mosaic of agency and court decisions relative to issues under the Commission's FM and TV allotment practices provide an established base for parties and their lawyers to study and derive reliable information to govern their affairs.

34. The Commission's notice at ¶29 segues from its regulatory program -- to deal with changes in community of license by a one-step procedure -- to a radical proposal to jettison the highly successful rulemaking system itself. As we attempt to understand ¶29, the present system would be replaced with a vaguely described idea to put the table of allotments in the Commission's database -- in itself a frightening thought -- and to establish an "adjudatory" process to deal with new frequency allocations. Such allocations are also to be filed in a one-step, first-come, first-served basis, with no provision for

public participation in the allotment process.

35. We do not think this is a good idea; indeed, it may not be lawful for a federal agency to distance itself from the Administrative Procedure Act in this egregious fashion. To be sure, the "Tuck" policy is a mess and needs to be fixed or abandoned. But the fundamental allotment procedures under the APA are not; to the contrary, they are, and since the very advent of FM and TV technology, have been an integral part of the FCC's success story in the allocation and management of the FM and TV spectrum for our nation.

36. If the reason for this revolutionary change is to avoid the court-made APA law that members of the public are entitled to notice of the "logical outgrowth" of a proposed rule, e.g., Weyerhaeuser v. Costle, 590 F.2d 702 (D.C.Cir. 1958), there is no assurance that the courts won't apply a comparable requirement to the agency's maneuver to establish to a "closed" allocation procedure to its own liking.

37. In the AM and noncommercial educational FM fields, the courts early on became involved in legal issues pertaining to fair notice with respect to "daisy chains" under the Commission's system for processing such applications. Ranger v. FCC, 294 F.2d 240 (D.C.Cir. 1961) (standard broadcast applications); Kittyhawk Broadcasting Corp. et al, 7 FCC 2d 153 (1967), recon. denied, 10 FCC 2d 160 (1968), appeal dismissed sub nom. Cook, Inc. v. United States, 394 F.2d 84 (7th Cir. 1968) (standard broadcast applications); Florida Inst. of Technology v. FCC, 952 F.2d 549 (D.C.C-



ir. 1992) (non-commercial FM applications). Court involvement with respect to fair notice under tables of allotments in the television and FM fields dates back to Owensboro on the Air v. United States, 262 F.2d 702 (D.C.Cir. 1958) and is as recent as Charles Crawford v. FCC, supra, decided August 5, 2005. Future court involvement with respect to fair notice issues under the Administrative Procedure Act posed by a "closed" allocation scheme now under consideration by this federal agency seem assured.

B.

Proposal to require filing a completed application  
and payment of the filing fee upon submitting a  
petition to allot an FM channel

38. We oppose the idea, Commission's notice at ¶¶30-34, of requiring parties proposing an FM channel allotment to prepare a complete application with all of the engineering and other details and payment of the filing fee for such application before knowing if the channel will become available. We do so on the ground that this further widens the gap between rural and city interests; persons desiring to pursue a more lucrative city allotment are less burdened by such a requirement than persons residing in small rural communities.

C.

Rule change to allow filing allotment proceeding  
petitions and papers electronically

39. From what has been said in A above, we oppose using the Commission's database as the official source for something as important and legally significant as the register of channel allotments. We do not object to a rule change, Commission's